No 964

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

In the Matter of the Application

of

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, for an order requiring the production of documentary evidence by STANDARD DREDGING CORPORATION, a corporation, pursuant to subpoena.

STANDARD DREDGING CORPORATION,
Appellant.

TRANSCRIPT OF RECORD

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPREME PRINTING COMPANY, LAW PRINTERS, BARCLAY 7-0349

INDEX.

United States District Court

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SOUTHERN DISTRICT OF NEW YORK.

In the Matter of the Application
of
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, for an order requiring the production of documentary evidence by STANDARD DREDGING CORPORATION, a corporation, pursuant to subpoena.

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Statement.

1942

Feb. 4—Filed order to show cause dated February 3, 1942 and petition to compel production of documents, etc.

Feb. 27—Order to show cause argued before Rifkind, J. and answer of respondent submitted.

Apr. 27—Opinion of Rifkind, J. granting petitioner to compel production of documents, etc. 3

May 8—Stipulation substituting L. Metcalfe Walling, as petitioner in place of Thomas H. Holland.

May 9—Order granting petition and directing Standard Dredging Corporation to produce documents, etc.

May 29—Filed notice and allowance of appeal.

June 8—Stipulation waiving issuance and service of citation on appeal.

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Order to Show Cause.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon the petition of Thomas W. Holland, Administrator of the Wage and Hour Division, United States De-
5 partment of Labor, duly verified the 31st day of January, 1942, and filed herein on the 4th day of February, 1942, and the exhibits annexed thereto, it is hereby

ORDERED that respondent, Standard Dredging Corporation, show cause before one of the Judges of this Court, at a stated term thereof for motions, to be held in *Room 506* of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the *17th* day of February, 1942, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, *why an order* of this Court *should not issue requiring*
6 *said respondent to appear before Thomas W. Holland, Administrator* of the Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division designated by him, at such time and place as this Court may determine, *and there to produce the following books, papers, documents and records*:

1. Any and all books and records which record the wages paid to respondent's employees, during the period from October 24, 1938 to December 1, 1941.

2. Any and all books, records, documents, time cards, time sheets, papers or memoranda made or kept by

respondent, which record the hours worked each workday and each workweek by respondent's employees during the period from October 24, 1938 to December 1, 1941.

3. Any and all contracts, agreements or memoranda of agreements to which respondent is a party for the performance by respondent of dredging and drill work, levee construction, filling work and excavating work during the period between October 24, 1938 and December 1, 1941.

FURTHER ORDERED that service of a copy of this Order to Show Cause, together with copy of said petition of Thomas W. Holland, be made upon respondent on or before the 5th day of February, 12 noon, and that such service be deemed sufficient service.

Dated: New York, N. Y., February 3, 1942.

HULBERT,
United States District Judge.

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Petition.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the United States District Court for the Southern District of New York:

11

Petitioner, Thomas W. Holland, Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*, hereinafter called the Act, respectfully shows and alleges that:

I. Petitioner Thomas W. Holland (herein referred to as the Administrator) is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator, or his designated representatives are
12 empowered by virtue of Section 11(a) of the Act to investigate, enter and inspect places and records (and make such transcriptions thereof) of employment, in any industry, as he may deem necessary or proper to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of Section 9 of the Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 26, 1914, as amended, U. S C., Title 15, Sections 49 and 50 (relating to the attendance of witnesses and the production of books, papers and documents) are made applicable to the jurisdiction, powers and duties of the Administrator, and the

Administrator, or his authorized representative, has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records and papers relating to any matter under investigation;

II. Jurisdiction to issue the order hereinafter prayed for is conferred upon this Court by virtue of Section 9 of the Federal Trade Commission Act (made applicable by Section 9 of the Act, as aforesaid) which empowers any of the District Courts of the United States within 14
the jurisdiction of which an investigation is carried on, in case of refusal to obey a subpoena to any corporation or other person, to issue an order requiring such corporation or other person to produce the books, documents, records and papers designated in the subpoena. The investigation, in the course of which the subpoena *duces tecum* was issued by the authorized representative of the Administrator and served, as hereinafter set forth, is being conducted in the Southern District of New York within the jurisdiction of this Court;

III. At all times hereinafter referred to, respondent 15
was and is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at 80 Broad Street, Borough of Manhattan, City, County and State of New York, within the jurisdiction of this Court;

IV. Upon information and belief: C. B. Birch, during all times herein mentioned was and is an officer of respondent, to wit: its treasurer.

V. Upon information and belief: Respondent is engaged in the performance of contracts for the dredging of coastal harbors, ship channels and ship canals, navi-

gable rivers, streams and waterways in and about the navigable waters of the United States. It is also engaged in fulfilling contracts for the construction of levees, embankments, bulkheads and breakwaters, the filling and excavating of land and similar work in and about the navigable waters of the United States. In these and other ways, respondent is an employer of employees engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

17 VI. Upon information and belief: During the months of January, May and November, 1941, petitioner, acting through his representatives, sought to make an investigation of respondent's business pursuant to Section 11(a) of the Act. Such investigation was refused by respondent on the ground that its business was not subject to the provisions of the Act and that its employees were not engaged in activities covered by the Act or were subject to an exemption from the minimum wage and maximum hour provisions of the Act provided in Section 13(a)(3) for "any employee employed as a seaman". As appears from the affidavit of Henry J. Easton annexed hereto as
18 Exhibit "A", respondent refused to permit a representative of the Wage and Hour Division to examine records pertaining to hours worked by or compensation received by such employees. Continuous efforts have been made by representatives of the Wage and Hour Division to persuade respondent to permit such an investigation, but without success.

VII. Thereafter Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Departmet of Labor, whom your petitioner succeeded in office, under the powers delegated to him in the Act, issued an Order for Investigation of respondent and designated

therein his representatives for the purpose of such investigation. A copy of said Order for Investigation is annexed hereto, marked Exhibit "B" and made a part hereof.

VIII. Thereafter a subpoena *duces tecum* was duly issued by the said Philip B. Fleming, as Administrator of the Wage and Hour Division, requiring respondent to appear before one of the officers of the Wage and Hour Division designated in said Order for Investigation at 341 Ninth Avenue, Borough of Manhattan, City of New 20
York, in Room 911 on the ninth floor, on the 23rd day of December, 1941 at 10:30 o'clock in the forenoon of that date and to produce specific books, papers, documents and records. Said subpoena *duces tecum* was duly served upon respondent by delivering a duplicate original copy thereof to C. B. Birch, treasurer of respondent, at its place of business in New York, New York, on December 18, 1941. A copy of said subpoena *duces tecum* with the return endorsed thereon is annexed hereto, marked Exhibit "C" and made a part hereof.

IX. Upon information and belief: At all times herein 21
stated the said C. B. Birch, as an officer of respondent corporation, had and has custody and control of the books, papers, documents and records described in the said subpoena *duces tecum.*

X. At 10:30 A. M. on the 23rd day of December, 1941, Henry J. Easton, an officer of the Wage and Hour Division designated in said Order for Investigation and in said subpoena *duces tecum* was present at the office of the Wage and Hour Division, 341 Ninth Avenue, Borough of Manhattan, City of New York, in Room 911 on the ninth floor, for the purpose of examining the books,

papers, documents and records, production of which was required by the said subpoena, but respondent failed and refused to appear at the said time and place before the said officer or to produce the said books, papers, documents and records, as is more fully set forth in the affidavit of said Henry J. Easton annexed hereto, marked Exhibit "A" and made a part hereof.

XI. On December 23, 1941, Arthur E. Reyman, Regional Attorney of the Wage and Hour Division of the U. S.
23 Department of Labor for Region II, received a letter from Messrs. Kirlin, Campbell, Hickox, Keating & McGrann, attorneys, on behalf of respondent, stating that their client is not subject to the Act, because it is not engaged in commerce or in the production of goods for commerce within the meaning of the Act, and that, assuming but without admitting that respondent is engaged in activities covered by the Act, nevertheless respondent's employees are seamen exempt under the provisions of Section 13(a)(3) of the Act. The said letter further states that, in accordance with advice of counsel, respondent does not intend to comply with the subpoena issued here-
24 in until this question is determined by Federal courts. A copy of said letter is annexed hereto, marked Exhibit "D" and made a part hereof.

XII. All of the books, records, papers, documents, contracts, agreements, memoranda required to be produced by said subpoena were at the time of the issuance of said subpoena and are now relevant, material and appropriate to determine whether respondent has violated any provision of the Act and will aid in the enforcement of the provisions of the Act.

XIII. The books, records, papers, documents, contracts, agreements and memoranda required to be produced by

said subpoena were at the time of the issuance and service of said subpoena and are now in the possession, custody and control of respondent.

XIV. Petitioner respectfully appeals to this Court for an Order directing respondent to appear before him or before one or more of said authorized representatives and to produce the books, records, papers, documents, contracts, agreements and memoranda required by said subpoena as set forth above, at a time and place to be fixed in said Order.

XV. This application is brought on by Order to Show Cause rather than by Notice of Motion for the reason that the investigation hereinabove referred to has been seriously impeded by respondent's refusal to comply with said subpoena and because it is desirable that said investigation proceed as expeditiously as possible in order that violations of the Act, if found to exist, may be dealt with according to law without undue delay.

XVI. No previous application has been made for the relief requested herein.

WHEREFORE petitioner respectfully prays:

(a) That an Order be issued forthwith directing respondent to appear and show cause before this Court upon a certain day to be fixed in the said Order, why an Order should not issue requiring said respondent to produce the books, records, papers, documents, contracts, agreements and memoranda required by said subpoena *duces tecum*, before the petitioner or before one of his authorized representatives, at such time and place as this Court may order.

(b) That upon the return of said Order to Show Cause, as above set forth, an Order issue requiring respondent to produce the books, records, papers, documents, con-

tracts, agreements and memoranda required by said subpoena *duces tecum,* before petitioner or before one of his authorized representatives at such time and place as this Court may order.

(c) That petitioner have such other and further relief as may be necessary or appropriate.

WARNER W. GARDNER,
Solicitor,

29

IRVING J. LEVY,
Associate Solicitor in Charge
of Litigation,

ARTHUR E. REYMAN,
Regional Attorney,

JAMES L. GOLDWATER,
Attorney,

Attorneys for Petitioner,
30 United States Department of Labor.

Post Office Address:

% Wage and Hour Division,
U. S. Department of Labor,
341 Ninth Avenue,
New York, N. Y.

or

% Wage and Hour Division,
U. S. Department of Labor,
Washington, D. C.

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EXHIBIT "A."

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of the Application of THOMAS W. HOLLAND, Administrator of the Wage and Hour Division, United States Department of Labor, for an order requiring the production of documentary evidence by STANDARD DREDGING CORPORATION, a corporation, pursuant to subpoena.

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State of New York, }
County of New York, } ss.:

33

HENRY J. EASTON, being duly sworn, deposes and says:

He is an inspector in the Wage and Hour Division of the United States Department of Labor and is officially attached to the Regional Office for Region II of the Wage and Hour Division located at 341 Ninth Avenue, New York, New York.

During the month of January, 1941 deponent was designated to make an investigation of respondent's business pursuant to Section 11(a) of the Act. On or about January 16, 1941 and on or about May 6, 1941 deponent called at respondent's place of business and spoke to one C. B.

Birch who, deponent was informed, is treasurer of respondent. Again on or about November 24, 1941 deponent called the said C. B. Birch on the telephone at respondent's office, 80 Broad Street, Borough of Manhattan, City of New York, and spoke with the same C. B. Birch. On each of said occasions deponent demanded of the said C. B. Birch that he be permitted to inspect the books, records and other documents relating to the hours worked by and wages paid to respondent's employees. On each occasion deponent was informed by said C. B. Birch that,
35 while respondent would permit deponent to examine the payroll of those of respondent's employees, approximately four in number, who performed office work, deponent would not be shown records relating to any other employees, and said C. B. Birch in behalf of respondent in fact refused to permit deponent to examine records pertaining to the hours worked by or compensation received by such other employees.

On December 5, 1941 a subpoena *duces tecum* was duly issued by Philip B. Fleming, Administrator of the Wage and Hour Division, and duly served upon respondent, requiring respondent to appear before one of the officers
36 of the Wage and Hour Division mentioned in said subpoena *duces tecum* at 341 Ninth Avenue, Borough of Manhattan, City of New York, in Room 911 on the ninth floor, on the 23rd day of December 1941 at 10:30 o'clock in the forenoon and to produce certain books, papers, records and documents in the matters under investigation.

Deponent was present at the place designated in said subpoena *duces tecum* at 10:30 o'clock in the forenoon on December 23, 1941 and for several hours thereafter and awaited the appearance of respondent or its representative but said respondent and its representative and its attorneys failed and refused to appear in answer to said subpoena and did fail and refuse to produce any of the

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aforesaid books, papers, documents and records described in the aforesaid subpoena.

HENRY J. EASTON.

Sworn to before me this
31st day of Jan., 1942.

MORRIS GLICK,
Notary Public, New York County,
Clerk's No. 405, Register's No. 3-G-589,
Commission Expires March 30, 1943.

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(Seal)

EXHIBIT "B."

UNITED STATES OF AMERICA
WAGE AND HOUR DIVISION
DEPARTMENT OF LABOR

REGION NO. II

39

In the Matter
of
STANDARD DREDGING CORPORATION.

ORDER FOR INVESTIGATION AND DESIGNATING OFFICERS FOR TAKING TESTIMONY.

There being reasonable grounds to believe that the STANDARD DREDGING CORPORATION, beginning on or about October 24, 1938, and continuing to the date hereof, has violated the provisions of Sections 7 and 15(a)(2) of the

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act, in that, during the said period, it has employed many of its employees, engaged in commerce or in the production of goods for commerce, for workweeks longer than the hours specified by Section 7 of the Act and has failed to compensate them for their employment in excess of the said hours at rates not less than one and one-half times the regular rates at which they were respectively employed; and

41 There being reasonable grounds to believe that the said STANDARD DREDGING CORPORATION, during the said period, has violated the provisions of Sections 11(c) and 15(a)(5) of the Act in that it has failed to make, keep and preserve records of the persons employed by it and of the wages, hours and other conditions and practices of employment maintained by it as prescribed by regulations issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to Section 11(c) of the Act, which regulations, together with amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regula-

42 tions, Part 516; and

It appearing, therefore, that the investigation herein ordered to be made is necessary and appropriate to determine whether the said STANDARD DREDGING CORPORATION, or any of its officers, agents or employees has violated the said provisions of the Act or the provisions of the said regulations, and will aid in the enforcement of the provisions of the Act;

The undersigned, PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, hereby

ORDERS, pursuant to Sections 9 and 11(a) of the Act, that an investigation be made to determine whether

STANDARD DREDGING CORPORATION or any of its officers, agents or employees has violated any of the said provisions of the Act or of the said regulations; and further

ORDERS, pursuant to Sections 9 and 11(a) of the Act, that for the purpose of such investigation ROY J. CORRIGAN and HENRY J. EASTON, officers of the Wage and Hour Division, United States Department of Labor, and each of them, be and they hereby are designated to investigate and gather such data, enter and inspect such places and such records (and make such transcriptions thereof), 44 question such employees, and investigate such facts, conditions, practices, or matters as they, or any of them, may deem relevant or material to the inquiry, and to administer oaths and affirmations, take evidence and require the production of any pay roll or other records pertaining to the wages, hours and other conditions and practices of employment of the said STANDARD DREDGING CORPORATION, and of any books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith authorized by law; and further

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ORDERS that such investigation begin and continue at such times and places as the said Administrator or the said officers, or any of them, may determine.

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, D. C. this 5 day of Dec., 1941.

PHILIP B. FLEMING (sgd.)
PHILIP B. FLEMING, Administrator
Wage and Hour Division,
U. S. Department of Labor

EXHIBIT "C".

UNITED STATES OF AMERICA
Department of Labor
Wage and Hour Division

SUBPOENA DUCES TECUM

To STANDARD DREDGING CORPORATION
80 Broad Street, New York, New York

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At the instance of the ADMINISTRATOR, WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, you are hereby required to appear before ROY J. CORRIGAN and HENRY J. EASTON, officers of the WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR, at Room 911, Parcel Post Building, 341 Ninth Avenue, in the Borough of Manhattan, in the City, County and State of New York, on the 23rd day of December, 1941, at 10:30 o'clock a. m. of that day, to testify In the Matter of STANDARD DREDGING CORPORATION, involving a cause of action pursuant to the provisions of Sections 9 and 11(a) of the Fair Labor Standards Act of 1938 of
48 complaints of violations by the said Standard Dredging Corporation of Sections 7, 11(c), 15(a)(2) and 15(a)(5) of the said Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1938, to December 1, 1941.

(2) Any and all books, records, documents, time cards, time sheets, papers or memoranda of any kind made by

you, which record the hours worked each workday and each workweek by the said employees during the period from October 24, 1938, to December 1, 1941.

(3) Any and all contracts, agreements or memoranda of agreement to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levee construction, filling work and excavating work.

FAIL NOT AT YOUR PERIL.

IN TESTIMONY WHEREOF, the seal of the DEPARTMENT OF LABOR is affixed hereto, and the undersigned, an officer designated by the ADMINISTRATOR of the WAGE AND HOUR DIVISION of said DEPARTMENT OF LABOR, has hereunto set his hand at Washington, D. C. this 5th day of December, 1941.

(SEAL)

PHILIP B. FLEMING (Signed)
PHILIP B. FLEMING, Administrator
Wage and Hour Division,
United States Department of Labor

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher

EXHIBIT "D".

Cablegrams "Vasefield New York"

Ira A. Campbell
Charles R. Hickox
Cletus Keating
Wm. H. McGrann
Robert S. Erskine
L. de Grove Potter
Delbert M. Tibbetts
Vernon S. Jones
Donald D. Geary
Roger Siddall
H. Maurice Fridlund
Edwin S. Murphy
James H. Herbert
53 Clement C. Rinehart
Raymond Parmer
A. V. Cherbonnier
Joseph F. Luley
Richard Sullivan

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRAN
One Twenty Broadway

New York, December 22, 194

U. S. Department of Labor
Wage and Hour Division
341 Ninth Avenue
New York, New York *Attention of Mr. Reyma*

Standard Dredging Company

Dear Sirs:

As attorneys for Standard Dredging Company upon whom you served a subpoena *duces tecum*, we wish to advise you that in our opinion the Standard Dredging Company is not engaged in commerce or in the production
54 of goods for commerce within the meaning of the Fair Labor Standards Act of 1938. In addition, assuming but without admitting that the Company is so engaged, we are of the opinion that its employees are seamen and, therefore, are exempt under the provisions of Section 13(a)(3) of the Act.

As you know, the Company operates dredges, towboats and other maritime equipment and the courts have for many years past held that such employees are seamen within the meaning of various other Federal statutes. We see no reason why these men should be seamen within the meaning of one Federal statute and not seamen within the meaning of another Federal statute.

For the above reasons, we wish to advise you that the Company does not intend to comply with the subpoena

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until this question is determined by Federal courts. The decision on the part of the Company is not arbitrary but in the honest belief that the men aboard its maritime equipment are not subject to the provisions of the Act.

We confirm our understanding that you will serve us with a notice if you intend to seek to enforce the subpoena in the Federal District Court and that the motion will be brought on some time during the week of January 12th, 1942.

Very truly yours,

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KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
By /s/ A. V. CHERBONNIER.

AVC/tc
39012

cc to Standard Dredging Company
(Mr. Birch)

State of New York, }
County of New York, } ss.:

JAMES L. GOLDWATER, being first duly sworn, deposes and says that he is an Associate Attorney of the Wage and Hour Division; that he has read the foregoing Petition for an Order of this Court and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. 57

/s/ JAMES L. GOLDWATER.

Sworn to and subscribed before me this
31st day of Jan., 1942.

MORRIS GLICK,
Notary Public, New York County,
Clerk's No. 405, Register's No. 3-G-589,
Commission Expires March 30, 1943.

(Seal)

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Answer to Petition.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

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Standard Dredging Corporation, respondent above named, by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, in answer to the petition filed herein, alleges upon information and belief as follows:

1. It admits that the petitioner, Thomas W. Holland, is Administrator of the Wage and Hour Division, United States Department of Labor. It denies that Section 11 (a) of the Fair Labor Standards Act of 1938 (hereinafter called "Act") empowers the petitioner to investigate and gather data regarding the wages, hours and other conditions and practices of employment, or take any other step whatever in any industry except such industries as are subject to the provisions of the said Act. It denies each and every other allegation contained in Paragraph I of the petition except as herein expressly admitted.

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2. It admits the jurisdiction of this Court to order compliance to a subpoena properly issued by the petitioner but it denies that petitioner is entitled to the relief sought in the petition.

3. It admits the matters alleged in Paragraphs III and IV of the petition.

4. It denies each and every matter alleged in Paragraph V of the petition except as herein expressly admitted. Respondent is engaged in the business of dredging to improve waterways and fill low lying land and it is authorized to do business only in the States of New York, Louisiana and Texas.

5. It admits that it informed representatives of petitioner that it was not engaged in "commerce" as that term is defined in the Act, or as the Act is intended to comprehend the term. It also admits that it informed representatives of petitioner that assuming, but not admitting, that the Act otherwise covered its employees, its employees are "seamen" employed aboard dredges, towboats, launches and various types of barges and scows and under the provisions of Section 13 (a) (3) of the Act, "seamen" are specifically excluded from the provisions of Sections 6 and 7 of the Act. It denies that it has knowledge or information sufficient to form a belief as to the other matters alleged in Paragraph VI of the petition.

6. It denies that it has knowledge or information sufficient to form a belief as to the matters alleged in Paragraph VII of the petition.

7. It admits that a copy of Exhibit C attached to the petition was given to C. R. Birch, its Treasurer. It denies the other matters alleged in Paragraph VIII of the petition.

8. It admits that the books, papers, documents and records described in said subpoena *duces tecum* are in the custody and control of respondent corporation and that said C. R. Birch, as Treasurer of respondent corporation, has such control over the same as a treasurer of a corporation customarily has. It denies each and every other allegation in Paragraph IX of the petition.

64 *Answer to Petition.*

9. It admits that respondent did not appear or produce the books, papers, documents and records described in the subpoena *duces tecum* before said Henry J. Easton or any other officer of the Wage and Hour Division on December 23, 1941, at the office of the Wage and Hour Division. It denies that it has knowledge or information sufficient to form a belief as to the other allegations in Paragraph X of the petition.

10. It admits that its counsel addressed a letter to the
65 Wage and Hour Division, in New York, in accordance with Exhibit D attached to the petition.

11. It denies each and every matter alleged in Paragraph XII of the petition.

12. It admits the matters alleged in Paragraph XIII of the petition.

13. It denies petitioner's right to the order prayed for in Paragraph XIV of the petition.

66 14. It denies that petitioner is entitled to make the investigation referred to in Paragraph XV of the petition. It denies that a disclosure by respondent of the documents referred to in the subpoena would aid in the determination of whether or not those employed aboard respondent's dredges, towboats, launches, barges and scows are "seamen". It denies that it has knowledge or information sufficient to form a belief as to the other matters alleged in Paragraph XV of the petition.

15. It denies that it has knowledge or information sufficient to form a belief as to the matters alleged in Paragraph XVI of the petition.

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FURTHER ANSWERING, AND AS A SEPARATE DEFENSE, IT ALLEGES:

All dredges operated by respondent are documented vessels of the United States and all supporting equipment are vessels, as that word is applied to maritime affairs. The employees on vessels come within the provisions of U. S. Revised Statutes, Paragraph 4612 (46 U. S. C. A. Paragraph 713) and are "seamen" within the purview of Section 13 (a) (3) of the Act and as the Act comprehends the word "seamen."

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All equipment operated by respondent is within the admiralty and maritime jurisdiction of the United States and although respondent's business has a direct reference to commerce, respondent is not engaged in commerce or in the production of goods for commerce. Respondent produces no goods of any sort, nor does petitioner allege that respondent is engaged in the production of goods for commerce.

Respondent is not engaged in "commerce" as that word is defined in the Act and as the Act was intended to comprehend it; it is not engaged in any commercial intercourse among the several states or from any state to any

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place outside thereof. Respondent's business is confined to certain localities and consists solely of digging "ditches" in such localities or pumping and moving dirt in specified localities. Equipment operated by respondent moves on navigable waters of the United States in order to get to the various localities where the ditches are dug or the pumping is done. Respondent does not now own, nor has it ever owned, any of the equipment which it operates or has ever operated in its dredging business. Respondent is not engaged in the business of transportation.

Respondent denies that Congress, when it passed the Act, exercised its power to legislate on matters within

the admiralty and maritime jurisdiction of the United States but, on the contrary, Congress limited the exercise of its power to "regulate commerce among the several states." Congress did not exercise its full power under the commerce clause of the Constitution as the Act does not purport to regulate commerce "with the Indian tribes" or to regulate commerce from "foreign Nations" to the United States.

The minimum wages paid to employees engaged in dredging operations of a public nature are fixed in all
71 contracts promulgated by the United States Government and in all cases such minimum wages are greatly in excess of the minimums provided for in Section 6 of the Act. Petitioner does not allege that respondent has paid its employees less than the minimums provided for in the Act. Regardless of whether or not respondent is engaged in commerce or the production of goods for commerce and regardless of whether or not its employees are "seamen" within the provisions of Section 13 (a) (3) of the Act, petitioner is not entitled to inspect respondent's records concerning the amount of wages paid its employees unless and until it is decided that respondent's employees
72 and respondent are subject to the provisions of the Act and there has been a violation of Section 7 of the Act.

Petitioner seeks to inspect "any and all contracts, agreements or memorandum of agreements to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levy construction, filling work and excavating work". There are 29 such contracts, 18 of which are with departments of the United States Government and the contracts are in the possession of the United States Government and petitioner, as a representative thereof, has or should have access to such contracts; 3 of the contracts are with municipalities and consist of filling in low lying

land; 8 of the contracts are with private persons and consist of work on navigable waters in and around private property.

WHEREFORE, respondent prays that the petition herein be dismissed and that respondent be granted such other and further relief as justice in the premises may require.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Attorneys for Respondent,
120 Broadway,
New York, New York. 74

State of New York, }
County of New York, } ss.:

C. R. BIRCH, being duly sworn, says:

I am the Treasurer of Standard Dredging Corporation, the respondent herein.

I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds for my 75
belief as to the matters not within my own knowledge are obtained from records of respondent and statements of counsel.

The reason this verification is not made by respondent is that it is a corporation.

/s/ C. R. BIRCH.

Sworn to before me this
24th day of February, 1942.

HENRIETTA FORTENBACHER,
Notary Public.

(Seal)

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Opinion, Rifkind, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

PRESENT:

77

WARNER W. GARDNER, ESQ.,
Attorney for Petitioner.

IRVING J. LEVY, ESQ.,
ARTHUR E. REYMAN, ESQ.,
JAMES L. GOLDWATER, ESQ.,
MORTIMER C. WOLF, ESQ.,
of Counsel.

MESSRS. KIRLIN, CAMPBELL, HICKOX,
KEATING & MCGRANN,
Attorneys for Respondent.

78

A. V. CHERBONNIER, ESQ.,
of Counsel.

Argued: February 27, 1942.

RIFKIND, D. J.

This is an application for an order to enforce a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division of the United States Department of Labor. The relief is sought under the Fair Labor Standards Act of 1938.

The respondent interposes two objections to the enforcement of the subpoena. The first is that all but four of respondent's employees are seamen and as such are exempt under the law. But Section 13(a) of the Act does not grant a general exemption concerning seamen. It provides: "The provisions of sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman". Section 6 establishes minimum wages; section 7 establishes maximum hours. These two sections are not the whole of the Act. Section 12, for instance, deals with child labor; section 14 with apprentices. 80

There is nothing in section 13(a) to express a congressional intention to make these and other provisions of the Act inapplicable to seamen. It may be that they are inapplicable—and no opinion is expressed thereon—but, if so, it is for reasons other than the exemptions provided by section 13(a).

The second objection interposed by respondent is that it is not engaged in commerce as defined in the Act. The question presented is whether that makes any difference. If this were a proceeding to enforce section 6 or 7(a) of the Act the test would be whether the *employees* affected were engaged in commerce or in production of goods for 81 commerce. Under section 7(c) the question is whether the *employer* is engaged in the activities therein enumerated. Under section 5, the nature of the "industry" is the relevant guide. The duty imposed by section 11(c) is expressly confined to employers "subject to any provision of this Act". Manifestly, Congress has in each of the instances mentioned specifically delimited the incidence of the particular provision involved. The Administrator's power to issue a subpoena is derived from sections 9 and 11(a). Is the character of respondent's activity relevant to those sections? Section 9 does not answer the

question. The first sentence of section 11(a) reads as follows:

> "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions,
> 83 practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

The term "industry" which is employed in the foregoing section is defined in section 3(h). "'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed." The definition of industry evidently does not include the term "employer", which is separately defined in section 3(d). Industry, as defined in the Act, is the
84 concept utilized in the organization of industry-committees under section 5; it is wider and more inclusive than the term employer.

With these preliminaries it seems clear that section 11(a) confers upon the Administrator two distinct groups of powers. (1) He may investigate any industry *subject to the Act;* (2) he may investigate *any matters* which he deems necessary or appropriate to determine whether any person has violated the Act or which may aid in the enforcement of the Act. In other words, I do not construe the phrase "subject to this Act" as a limitation on the power to investigate which is contained in the latter half of the sentence.

A logical line divides the two powers of investigation. The first power is apparently intended largely for statistical and informational purposes. Its object is knowledge, like that of much of the data gathered under the census, not law enforcement. It is, therefore, addressed to an "industry" and not to an "employer". The second power is designed to facilitate the enforcement of a law which necessarily requires on part of the government an intimate acquaintance with working conditions, wages and hours of employment in individual establishments. The power granted is as broad as the need. "To determine 86
whether any person has violated any provision of this Act" it is no more requisite to know what wages he pays and what hours he keeps than to know whether he is engaged in commerce. There is nothing in section 11(a) to indicate a legislative intent that the Administrator may investigate concerning the former but that he must guess at the latter. Nor is there evident in the statute a purpose to divide an investigation into two distinct stages, one to ascertain the presence of "commerce" and the other, to determine other elements of violation of the law.

Since there is no limitation on the character of business 87
done by the person investigated, it follows that the Administrator is not obliged, as a condition of obtaining an enforcement order of his subpoena, to make any showing that the respondent is engaged in commerce.

Contra: *General Tobacco & Grocery Co.* v. *Fleming,* C. C. A. 6, 1942, 125 Fed. 2d 596.

In so providing, Congress has not exceeded its powers.

U. S. v. *Darby, 1940,* 312 U. S. 100, 125.

88 *Opinion, Rifkind, D. J.*

No reported authority passing on the precise question here presented which supports the view taken herein has been called to my attention.(1) Upon the argument counsel for the Administrator stated that the precise question was considered in *Cudahy Packing Co. of La., Ltd.* v. *Fleming.* However, neither the opinion of the Circuit Court of Appeals, C. C. A. 5th 1941, 119 Fed. 2d 209, nor the opinion of the U. S. Supreme Court, reported *sub nom, Cudahy Packing Co. of La., Ltd.* v. *Holland,* decided March 2, 1942, makese any reference thereto.

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The application is granted.
Submit order.

Dated April 27th, 1942.

/s/ Simon H. Rifkind,
U. S. D. J.

(1) In the following cases "commerce" was present. The effect of its absence was not discussed. *Fleming* v. *Montgomery Ward & Co., Inc.,* C. C. A. 7, 1940, 114 Fed. 2d 384, 391, cert. den. 61 S. Ct. 71, "Since
90 respondent is subject to the Act, the investigation is a lawful inquiry." *Fleming* v. *Cudahy Packing Co., Ltd.,* S. D. Cal. 1941, 41 Fed. Supp. 910, 912: The respondent stipulated in open court that it was engaged in interstate commerce.

Stipulation Dated May 6, 1942. 91

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED by and between the above-entitled parties, by their respective attorneys, that L. METCALFE WALLING is now the duly qualified Administrator of the Wage and Hour Division, United States Department of Labor, succeeding THOMAS W. HOLLAND, the above-named petitioner, that said L. METCALFE WALLING 92 may be substituted herein as the petitioner in the place and stead of the said THOMAS W. HOLLAND, and that this cause may be continued and maintained by said L. METCALFE WALLING as successor in office of the said THOMAS W. HOLLAND.

Dated: New York, N. Y., this 6th day of May, 1942.

WARNER W. GARDNER,
Solicitor,

ROY C. FRANK,
Assistant Solicitor,

93

ARTHUR E. REYMAN,
Regional Attorney,

WILLIAM E. SULLIVAN,
Assistant Attorney,

United States Department of Labor,
Attorneys for Petitioner.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Attorneys for Respondent.

So ordered.
May 6, 1942.

HENRY W. GODDARD,
U. S. D. J.

94

Order Dated May 9, 1942.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

THOMAS W. HOLLAND, Administrator of the Wage and Hour Division, United States Department of Labor, having moved by order to show cause dated February 3, 1942,
95 for an order of this Court directing respondent, Standard Dredging Corporation, a New York corporation, to appear before petitioner, or an officer or officers of the Wage and Hour Division duly designated by him, at such time and place as this Court may order, and there to produce the following books, papers and documents:

1. Any and all books and records which record the wages paid to its employees during the period from October 24, 1938, to December 1, 1941.

96 2. Any and all books, records, documents, time cards, time sheets, papers or memoranda of any kind made by it, which record the hours worked each workday and each workweek by said employees during the period from October 24, 1938, to December 1, 1941.

3. Any and all contracts, agreements or memoranda of agreement to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levee construction, filling work and excavating work;

and to give evidence such as is required by the Subpoena *Duces Tecum* of the Administrator of the Wage and Hour Division, which was duly served upon respondent in connection with an investigation of respondent pursuant to Sections 9 and 11(a) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress; 52 Stat. 1060); and

Said motion having duly come on to be heard before Honorable Simon H. Rifkind, United States District Judge, on February 27, 1942, and upon consideration of the application of the petitioner, the answer of the re- 98
spondent thereto, and after hearing argument of counsel on behalf of the parties, and on all of the proceedings herein,

Now, Therefore, on motion of the attorneys for the Administrator of the Wage and Hour Division, and sufficient cause appearing therefor, it is

Ordered, that respondent Standard Dredging Corporation, do appear before petitioner, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor who as successor in office of 99
the said Thomas W. Holland has been duly substituted as petitioner herein, or any other officer or officers duly designated by petitioner, on May 18, 1942, at 10:00 o'clock a. m., at Room 911, Parcel Post Building, 341 Ninth Avenue, in the Borough of Manhattan, City, County and State of New York, and there produce the books and records detailed in paragraphs 1, 2 and 3 of the said order to show cause.

Dated: New York, New York, May 9, 1942.

Simon H. Rifkind,
United States District Judge.

100 **Notice and Allowance of Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that Standard Dredging Corporation, the respondent herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order directing said Standard Dredging Corporation to appear before the petitioner and produce certain documents, entered herein on May 9, 1942, and that the respondent hereby petitions this Court that said appeal be allowed.

101

Dated, New York, May 28, 1942.

Yours, etc.,

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Attorneys for Respondent,
Office and Post Office Address:
120 Broadway,
Borough of Manhattan,
City of New York.

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To:

WARNER W. GARDNER, Esq., Solicitor,
ROY C. FRANK, Esq., Assistant Solicitor,
ARTHUR E. REYMAN, Esq., Regional Attorney,
WILLIAM E. SULLIVAN, Esq., Assistant Attorney,
U. S. Department of Labor,
Attorneys for Petitioner,
Post Office Address:
Arthur E. Reyman,
Regional Attorney,
United States Department of Labor,
341 Ninth Avenue,
New York, N. Y.

ALLOWANCE.

The appeal contained in the foregoing notice and petition be and is hereby allowed.

Dated, New York, May 28, 1942.

SAMUEL MANDELBAUM,
U. S. D. J.

Stipulation as to Record. 104

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, June 24, 1942. 105

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Attorneys for Respondent.

WARNER W. GARDNER,
Solicitor,
ROY C. FRANK,
Assistant Solicitor,
ARTHUR E. REYMAN,
Regional Attorney,
WILLIAM E. SULLIVAN,
Assistant Attorney,

Attorneys for Petitioner.

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Clerk's Certificate.

UNITED STATES OF AMERICA, }
Southern District of New York, } SS.:

[SAME TITLE]

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a
107 correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of June, in the year of our Lord one thousand nine hundred and forty-two and of the Independence of the said United States the one hundred and sixty-sixth.

GEORGE J. H. FOLLMER,
(Seal) Clerk.

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[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 63

(Argued November 4, 1942. Decided January 14, 1943)

L. METCALFE WALLING, Administrator, etc., Appellee,

v.

STANDARD DREDGING CORPORATION, Appellant

Appeal from an order of the United States District Court for the Southern District of New York requiring an employer to appear before the Administrator of the Wage and Hour Division, and produce certain books and records.

Before L. Hand, Clark and Frank, Circuit Judges

Arthur E. Reyman, for the Appellee.
Robert A. Lilly, for the Appellant.

PER CURIAM:

Order affirmed on authority of *Perkins* v. *Endicott-Johnson*, 317 U. S. ——.

[fol. 38] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of January one thousand nine hundred and forty-three.

Present: Hon. Learned Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of Application of L. METCALFE WALLING, Administrator of Wage and Hour Division, etc., Standard Dredging Corp., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 39] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re L. Metcalfe Walling, Administrator, etc. (Standard Dredging Corp.). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 30, 1943. D. E. Roberts, Clerk.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 964

STANDARD DREDGING CORPORATION,
Petitioner,

against

L. METCALF WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION WITH BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ROGER SIDDALL,
A. V. CHERBONNIER,
ROBERT A. LILLY,
Counsel for Petitioner,
120 Broadway,
New York, N. Y.

Fredrick Printg. Inc., 32 Thomas St., New York, U. S. A.

SUMMARY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

STANDARD DREDGING CORPORATION,
Petitioner,

against

L. METCALF WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Standard Dredging Corporation, respectfully prays that a writ of certiorari issue to review the final order of the United States Circuit Court of Appeals for the Second Circuit entered on January 30, 1943 (R. 37) affirming a final order of the United States District Court for the Southern District of New York entered on May 9th, 1942 (R. 32).

OPINIONS BELOW.

The opinion of the district court is reported in 44 F. Supp. 601. The opinion of the court of appeals is reported in 132 F. (2d) 322.

Jurisdiction.

The jurisdiction of the lower courts was invoked under the provisions of Section 9 of the Fair Labor Standards Act of 1938, 29 U. S. C. 209. Jurisdiction of this Court to issue the writ sought is provided by the Act of February 13, 1925, 28 U. S. C. 347 (a). In *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357 (1942), this Court assumed jurisdiction on a state of jurisdictional facts identical to those here involved.

Designation of Parties.

The petitioner in this Court was the respondent-appellant below, and the respondent in this Court was the petitioner-respondent below. To avoid confusion, we shall refer to the petitioner here as the dredging company and to the respondent here as the administrator.

Statement of the Case.

On December 5th, 1941, the administrator made an order (R. 13) which, after reciting that there were "reasonable grounds to believe" that the dredging company had violated Sections 7, 11 and 15 of the Fair Labor Standards Act of 1938, ordered that an investigation be made pursuant to Sections 9 and 11 (a) of said Act to determine whether the dredging company or any of its officers, agents or employees had violated the Act. On the same day, viz., December 5th, 1941, the administrator signed and issued a supoena (R. 16) to the dredging company which required that it produce the following books, papers and documents:

> "(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1938, to December 1, 1941.

"(2) Any and all books, records, documents, time cards, time sheets, papers or memoranda of any kind made by you, which record the hours worked each workday and each workweek by the said employees during the period from October 24, 1938, to December 1, 1941.

"(3) Any and all contracts, agreements or memoranda of agreement to which Standard Dredging Corporation is a party for the performance by Standard Dredging Corporation between October 24, 1938, and December 1, 1941, of dredging and drill work, levee construction, filling work and excavating work."

On December 22, 1941, the attorneys for the dredging company wrote the administrator a letter (R. 18) saying that they were of the opinion that the dredging company and its employees were not subject to the Act and that the dredging company would not, therefore, comply with the subpoena until the matter was decided by the federal courts.

On February 4th, 1942, the administrator filed in the United States District Court for the Southern District of New York an articulated petition (R. 4) verified and composed in the form and style of a bill of complaint. In this petition, the administrator made allegations of fact and conclusions of law in 16 articles, and prayed for an order enforcing the subpoena aforesaid (R. 4-10).

The matter was brought before the court by an order to show cause (R. 2), and on February 27th the dredging company appeared and filed a formal answer (R. 20) which, by denial of the allegations contained in the petition, put in issue the question as to whether the dredging company or its employees were subject to the Fair Labor Standards Act of 1938.

Thereupon the district judge, without taking any evidence or holding any hearing on the issues so raised by the pleadings, made an order enforcing the subpoena (R. 32). He filed an opinion (R. 26) in which, briefly stated, he held that the inquisitorial powers of the administrator were not limited in application to persons or corporations subject to the Act and that the administrator was entitled to have his subpoena enforced as a matter of course, automatically. In this opinion, the district judge admitted that his decision was contrary to the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming,* 125 F. (2d) 596 (6th C. C. A., 1942), and he admitted that there was no reported authority to support his view (R. 29, 30).

Appeal was duly taken to the Circuit Court of Appeals for the Second Circuit (R. 34), and on January 14th, 1943, the court of appeals filed a *per curiam* opinion reading (R. 37):

> "Order affirmed on authority of *Perkins* v. *Endicott-Johnson,* 317 U. S. 501."

It is the order of the court of appeals entered on this *per curiam* opinion (R. 37) which the dredging company seeks to review in this Court by writ of certiorari.

Question Involved.

The question involved is whether, when the administrator seeks court aid in enforcing his subpoena pursuant to Section 9 of the Fair Labor Standards Act of 1938 the district court should grant such enforcement as a matter of course and automatically, merely because the administrator asks it, or whether the district court should exercise its

judicial function by inquiring into the circumstances and making a determination as to whether the subpoena seeks proper information or, on the contrary, invades the citizen's constitutional or other rights to freedom from unreasonable searches and seizures.

This question naturally resolves itself into the two following inquiries:

(a) As a matter of interpreting the statute, was it the intention of Congress that the court should be a mere mechanical device to enforce the administrator's will, or was it the intention, in requiring the administrator to resort to court, that the court should exercise its judicial discretion to protect the citizen against unconstitutional or illegal searches and seizures?

(b) If it was the intention of the statute that the court should be a mere mechanical device, thus in effect making the administrator the sole judge of the propriety of his subpoena, does the Constitution permit Congress to vest in the administrator an unrestrained inquisitorial power over the citizen?

Reasons for Granting the Writ.

(1) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596 (6th C. C. A., 1942). On its facts, the *General Tobacco* case is exactly parallel to the case at bar and the result is exactly opposite. The *General Tobacco* case has not been disapproved or over-ruled by this Court.

(2) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the decision of the United States District Court for the District of New Jersey in *Walling* v. *News Printing Co.*, handed down April 3, 1943, and printed herein as Appendix A. The New Jersey court does not agree with the Second Circuit that the question is controlled by the *Endicott Johnson* case.

(3) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the rationale of the decision of the Circuit Court of Appeals for the Sixth Circuit in *Goodyear Tire & Rubber Co.* v. *N. L. R. B.*, 122 F. (2d) 450 (6th C. C. A., 1941), and with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Cudahy Packing Co.* v. *N. L. R. B.*, 117 F. (2d) 692 (10th C. C. A., 1941). These cases decided a substantially identical question arising under the National Labor Relations Act and held that the court should exercise a supervisory power over the board's subpoenas. They have not been overruled or disapproved by this Court.

(4) In deciding the case at bar on the authority of *Perkins* v. *Endicott Johnson Corp.*, 317 U. S. 501 (Jan. 11, 1943), the court of appeals has apparently misconceived the effect of the decision of this Court. The *Endicott Johnson* case, as decided by the Supreme Court, is clearly distinguishable from the case at bar.

(5) The question involved is one of great public importance and there is pressing need for final determination of the matter by the Supreme Court. We need not labor this point; the magnitude of the problem is strikingly shown by the facts given in the dissenting opinion of Mr. Justice

Douglas in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 367 (1942).

Respectfully submitted,

STANDARD DREDGING CORPORATION, Petitioner.

By ROGER SIDDALL,
A. V. CHERBONNIER,
ROBERT A. LILLY,
Counsel for Petitioner.

New York, N. Y.
April 26, 1943.

I certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

ROGER SIDDALL.

New York, N. Y.
April 26, 1943.

BRIEF IN SUPPORT OF PETITION.

The *Endicott Johnson* Case Discussed.

It seems to us that there is no need to add any words to what the petition says about the conflict between the circuits or the public importance of the question involved. These matters are self-evident. We think it is desirable, however, to discuss briefly the *Endicott Johnson* case.

The case of *Perkins* v. *Endicott Johnson Corp.*, 37 F. Supp. 604, 40 F. Supp. 254 (N. D. N. Y. 1941); 128 F. (2d) 208 (2nd C. C. A., 1942); 317 U. S. 501 (Jan. 11, 1943), arose on an application by the Secretary of Labor to enforce a subpoena under the provisions of the Walsh-Healy Public Contracts Act against the corporation, which had entered into contracts for the supplying of shoes to the United States. The shoes which the contractor had supplied were made in four of its numerous plants, but the materials used in these four plants were produced in a number of others of the contractor's plants. The contractor quite willingly submitted its records from the four plants in which the shoes were made, but it resisted the secretary's subpoena as it related to the other plants. The district court first held that there should be a trial of the issues as to whether the other plans were embraced by the Walsh-Healy Act (37 F. Supp. 604), and then after holding such a trial, it found that they were not. Accordingly, the court said it should not assist the secretary in an extra-legal inquisition (40 F. Supp. 254).

The Circuit Court of Appeals for the Second Circuit reversed the order of the district court and remanded the case with instructions that the court should enforce the subpoena (128 F. (2d) 208). Judge Frank wrote the opinion and dealt with the question on broad grounds. After

pointing out the importance of the functions which had been entrusted to administrative bodies by federal legislation of the past few years, he went on to show his belief that the intervention by courts to supervise the subpoena power of these administrative bodies would impose upon them intolerable delays and frustrations in carrying out their duties. Such court interventions, he thought, were in the nature of interlocutory appeals, which have been consistently frowned on in federal practice. After balancing the interests, Judge Frank concluded that the courts should abdicate from any attempt to protect the citizen against unreasonable searches and seizures while the investigation was in progress. It would be time enough, in his philosophy, to vindicate the citizen's rights after the search and seizure had been made and when the final issues had come on for ultimate determination. A kind of posthumous vindication, it seems to us.

The judge candidly admitted that there were many authorities opposed to him and in particular some opinions written by the late Mr. Justice Holmes. He thought, however, that these should be distinguished or overruled to the necessary extent.

Judge Frank's opinion was thus, as we have said, based on broad grounds, and if it correctly states the law the dredging company in the case at bar has not a leg to stand on.

But while it is true that the Supreme Court affirmed the order of the court of appeals it did not by any means accept Judge Frank's sweeping conclusions. On the contrary, the Supreme Court arrived at its decision solely upon the consideration that Endicott Johnson Corporation appeared, not in the character of citizen, but in the character of public contractor. The Walsh-Healy Act, said the Court (page 507, 317 U. S.):

"is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract. Its purpose is to use the leverage of the Government's immense purchasing power to raise labor standards.

"Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts.[10] One of her principal functions is the conclusive determination of questions of fact for the guidance of procurement officers in withholding awards of government contracts to those she finds to be violators for three years from the date of the breach." [10. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, and cases there cited.]

Accordingly, the Court held that as the whole matter involved merely the procurement activities of the government, the subject was one entirely to be dealt with by the executive branch and the courts should not intervene. No constitutional question was involved; no judicial question was involved.

As was said of the Walsh-Healy Act by Mr. Justice Black in the *Lukens Steel* case just cited (page 128, 310 U. S.):

"We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases. * * *

"The Act does not represent an exercise by Congress of regulatory power over private business or employment."

In the case at bar, the Fair Labor Standards Act of 1938 has nothing to do with government procurement. On the contrary, it most clearly is "an exercise by Congress of regulatory power over private business or employment" and the dredging company appears here as citizen, not as contractor. On the grounds upon which it was put in the Supreme Court, the decision in the *Endicott Johnson* case has no application.

We respectfully submit, therefore, that for the reasons stated in the petition and in this brief, this Court should grant a writ of certiorari and review the highly important questions that are here involved.

Respectfully submitted,

ROGER SIDDALL,
A. V. CHERBONNIER,
ROBERT A. LILLY,
Counsel for Petitioner.

New York, N. Y.,
April 26, 1943.

APPENDIX A.

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

IN THE MATTER

of

The Application of L. METCALFE WALLING, ADMINISTRATOR of the WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, for an Order requiring the production of documentary evidence by NEWS PRINTING COMPANY, a corporation, pursuant to subpoena

Appearances:

ARTHUR E. REYMAN, Esq., Regional Attorney, U. S. Department of Labor, for the Applicant.

COLE & MORRILL, Esqs., Attorneys for Respondent, ELISHA HANSON, Esq., of Counsel.

(Opinion filed April 3, 1943.)

MEANEY, District Judge.

The question to be determined in this case is whether this Court should issue an order enforcing the subpoena duces tecum heretofore issued by the Administrator of the Wage and Hour Division of the Fair Labor Standards Act of 1938 (29 U. S. C. sec. 201 *et seq.*) pursuant to Section 9 of the said Act. (In this opinion said Administrator shall be referred to as the Administrator, and said Act as the Act.)

The Respondent herein is engaged in the business of publishing a newspaper in Paterson, New Jersey, within the jurisdiction of this Court, and refused permission to the agents of the Administrator to inspect its books and records, on the ground that its business was not subject to the provisions of the Act and that its employees were not affected by it.

The purpose of the requested inspection was to examine the records of the respondent to determine the hours worked by and the compensation received by its employees and to seek for possible violations of sections 6, 7, 11(c), 15(a)(2) and 15(a)(5) of the Act.

Upon the refusal of the respondent to permit any inspection of its books or records, the Administrator issued a subpoena duces tecum, requiring the Respondent to appear before one of the officers of the Wage & Hour Division, United States Department of Labor and to produce all books and records concerning hours and wages of its employees from January 1, 1941 to the date of the subpoena, May 15, 1942, and also all records pertaining to sale, shipment, delivery or transportation by Respondent of newspapers, books, periodicals or goods of any character between the same dates.

Upon advice of counsel, Respondent failed to observe the requirements of the subpoena, whereupon the Administrator filed a petition requesting the issuance by this Court of an order to show cause why an order should not issue directing Respondent to comply with the requirements of the said subpoena. The order to show cause was issued and argument had thereon.

In an examination of the situation before the Court, the first matter that arises for settlement would seem to be whether in a proceeding such as the instant one, the Respondent may raise the question of its coverage by the Act.

In its return to the Order to Show Cause, Respondent, along with certain objections to the constitutionality of the Act in its attempted application to a newspaper, in effect sets forth its claim that the Administrator is without

jurisdiction over Respondent and that the Act does not apply to it.

The Administrator insists that the question of coverage may not be raised in opposition to the enforcement of the subpoena and insists that Congress by the enactment of the Act intended that the Administrator should have full power to administer its provisions and that all phases of its administration within the provisions of the Act were left to his judgment and not to the judgment of the Courts.

Relying on sections 9 and 11(a) of the Act, the Administrator insists that the issuance of the subpoena is in nowise dependent on proof of coverage and that under the broad provisions of section 11(a) he has power not only to investigate and gather data concerning pertinent matters in any industry subject to this Act, but that he may also issue administrative subpoenas and secure enforcement of them in this Court regardless of the question of coverage, since that issue is not a jurisdictional fact to be determined by the Court before such enforcement, but is initially for the Administrator to determine as a fact, binding on the Court.

Reliance is had in large part by the Administrator on the cases of *Perkins* vs. *Endicott Johnson Corp.*, 128 F. (2d) 208, affirmed, by the United States Supreme Court in an opinion recently handed down by Mr. Justice Jackson, and upon *Holland* v. *Standard Dredging Corp.*, 44 F. Supp. 601.

Careful analysis of the opinion of Justice Jackson in the *Endicott Johnson* case indicates a distinction between that case and the one at bar. In the *Endicott Johnson* case, the corporation had voluntarily entered into contracts with the Government, and the matter which the Secretary of Labor was investigating was an alleged violation of the Act on the part of those who had become subject to the provisions of the Act by their own choice. *The Walsh-Healy Public Contracts Act,* 41 U. S. C., Sec. 35-45, provided a course of procedure during which the subpoena in question was issued. That act provided that the Secretary was authorized to hold hearings "on complaint of a breach or violation of any representation or stipulation" and "to

issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath" and provided in case of refusal of any person to obey such an order that the District Court should have jurisdiction to order compliance with the direction of the Secretary.

No such procedure is outlined in the Fair Labor Standards Act.

In the *Endicott Johnson Corporation* case, the secretary in accordance with the provisions of the Walsh-Healy Public Contracts Act, instituted an administrative proceeding against the corporation, charging violation of the stipulations in the contract and in the course of the hearing, further provided for in the act, issued the subpoena the effect of which later was challenged.

In the instant case, the Administrator without complaint and simply in quest of infor[illegible]n upon which to base proceedings, should they be just[illegible]issued his subpoena directing the production of certain re[illegible]s, the examination of which might or might not disclose a [illegible]tion. The suggestion has been made that to deny enfo[illegible]ent of a subpoena such as the one issued in the instant [illegible]se would be to divide proceedings into two distinct stag[illegible]—one concerning the presence of "Commerce", and the other to determine other elements of violation of the law.

There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto; and to the objection that this course of procedure would lead to unwarranted delay in the carrying out of the Act, it would seem reasonable to suggest that only in cases where doubt could exist, would such question as had been raised herein be the basis of objection, and should frivolous claims be made they could very easily be determined by the Court at the time of application for an order enforcing the terms of the subpoena.

The U. S. Supreme Court in the *Endicott Johnson* case, above referred to, granted certiorari because "of the importance of the question in the enforcement of the Act,

and because of probable conflict with a holding of the Circuit Court of Appeals for the Sixth Circuit." Nowhere in the course of the opinion is there any rejection, specific or by patent implication, of the findings of the latter court as set forth in *General Tobacco & Grocery Company* vs. *Flemming,* 125 F. (2nd) 596. The finding in the *Endicott Johnson* case relates strictly to the procedure under the Walsh-Healy Public Contracts Act, which differs specifically from the Fair Labor Standards Act of 1938.

The trend and tendency of the present day is to enlarge the functions of administrative bodies in order to carry out the purposes of social legislation. Commendable as this is, the functions of the Courts remain, and those functions are not merely to act as an adjunct of administrative bodies, but rather in such instances as have been categorically indicated by Congress to implement the operation of such bodies. Desirable as the contribution of experts to government is, there is no indication that Congress has as yet determined to substitute a government of mere expert opinion, for a government of law.

The constitutional objections raised by Respondent include one which is based on the First Amendment, relative to abridgment of the freedom of the Press. No attempt to accomplish so reprehensible a purpose appears in this Act. Regulation of conditions under which a newspaper may be published, of itself, does not limit the freedom of the Press as envisaged in the salutary Amendment. The provisions of this Act relating to hours and wages of employees are not restrictions which might fairly be construed as violations of the newspaper's right to function as a medium for impartial distribution of the news. There is no reason why provisions of law aiming at sensible amelioration of conditions of employment should be barred of extension to the field of newspaper publication on the specious pretext of violating the Freedom of the Press. A newspaper is a business in addition to being a medium for dissemination of news and opinion, and as such is subject to the provisions of general laws of government. *Associated Press* v. *Labor Board,* 301 U. S. 103; *Near* v. *Minne-*

sota, 283 U. S. 697; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Fleming* v. *Lowell Sun Co.,* 36 F. Supp. 320 (reversed on other grounds, 120 F. 2nd. 213; affirmed 315 U. S. 784).

As for Respondent's contention that the provisions of the Fifth Amendment have been violated by the implications of the Act, there does not seem to the Court to be merit therein. The Supreme Court has repeatedly asserted that there is no requirement of uniformity in connection with the Commerce power. *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; *Florida Fruit and Produce* vs. *U. S.,* 117 F. 2nd 506. The Fifth Amendment has no equal protective clause. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, at page 584.

As to the insistment by the Respondent that the Act violates the 4th Amendment to the Constitution, that situation is dependent on the determination hereinbefore made which obviates necessity for discussion.

In view of the foregoing, the order to show cause why an order directing Respondent to appear before the Administrator's agent to produce evidence as set forth in the subpoena, is dismissed.

Since the Administrator has not had opportunity sufficiently to argue the question of coverage, that matter is left to such further proceedings as may be appropriate in the premises.

Let an order be entered in accordance herewith.

APPENDIX B.

TEXT OF STATUTORY PROVISIONS INVOLVED.

Fair Labor Standards Act of 1938, Sec. 3b, 3h, 3i, 3j, 7a, 9, 11a, 11c, 13a, 15a; 52 Stat. 1060; 29 U. S. C. 201 *et seq.*

"Sec. 3. As used in this Act—

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(h) 'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * * *

"Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * *

"Sec. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * * *

"Sec. 11(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall

make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * * *

"Sec. 13(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman; * * *

* * * * * *

"Sec. 15(a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * * *

(2) to violate any of the provisions of * * * section 7, * * *

* * * * * *

(5) to violate any of the provisions of section 11(c), * * *"

Federal Trade Commission Act, 1914, Sec. 9, 10; 38 Stat. 717; 15 U. S. C. 49, 50.

"Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating

to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

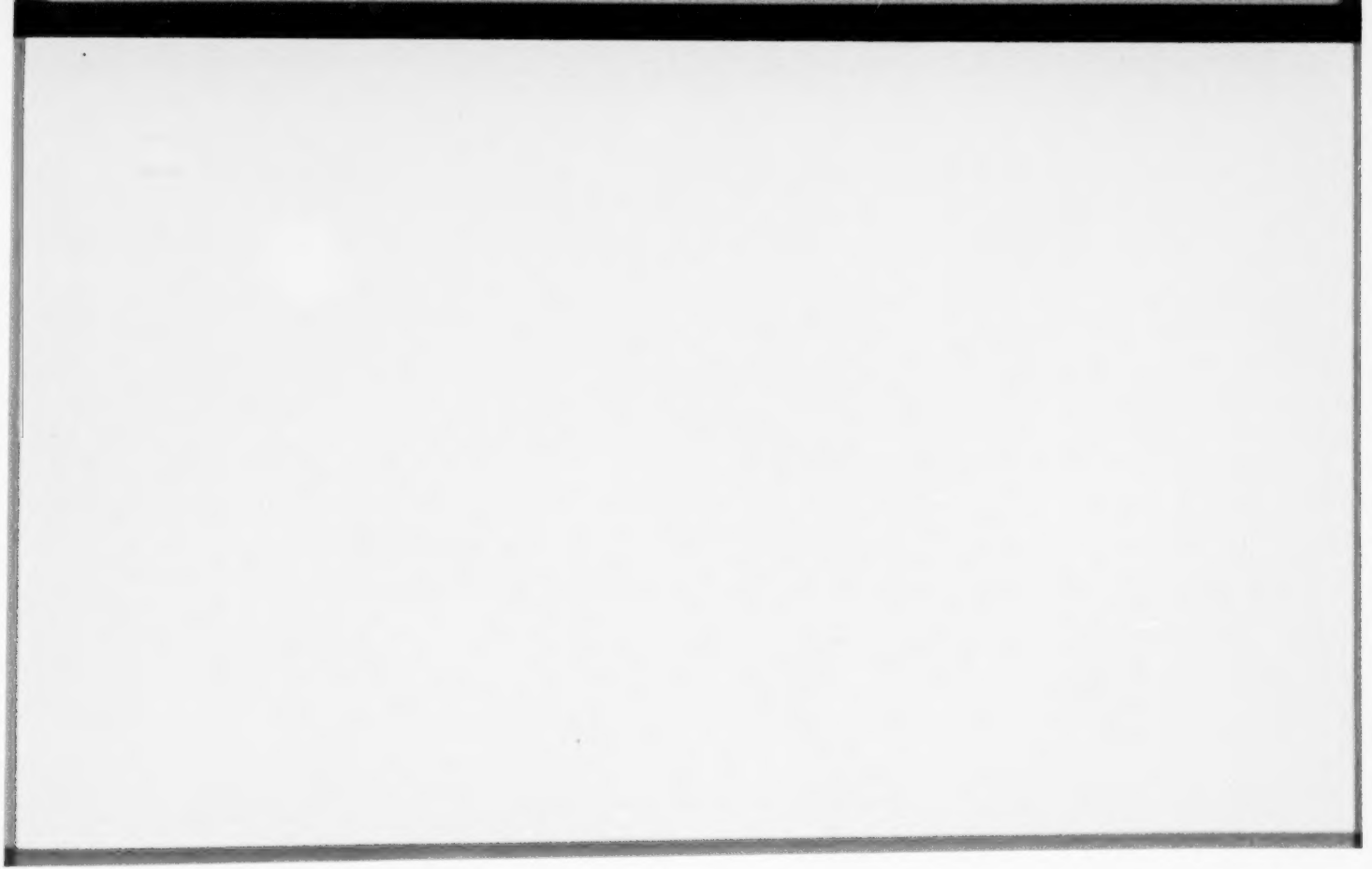
"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

* * * * * *

"Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall wilfully make, or cause to be made, any false entry in any account, record, or memorandum

kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his "control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment."



INDEX

CITATIONS

528155—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 964

STANDARD DREDGING CORPORATION, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 26–30) is reported in 44 F. Supp. 601. The opinion of the Circuit Court of Appeals (R. 37–38) is reported in 132 F. (2d) 322.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 30, 1943 (R. 38). The

petition for a writ of certorari was filed on April 27, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the District Court had power to order compliance with a subpoena *duces tecum* issued by the Administrator of the Wage and Hour Division, without a showing or determination that petitioner was subject to the Fair Labor Standards Act.

STATUTE INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C., sec. 49. These provisions are set forth in the Appendix.

STATEMENT

On January 31, 1942, the Administrator, pursuant to Section 9 of the Fair Labor Standards Act, applied to the District Court for an order requiring petitioner to produce before the Administrator, or his authorized representatives, certain records described in an administrative subpoena *duces tecum* previously directed to petitioner (R. 4–10). The documents requested by the subpoena were petitioner's records showing wages paid to and hours worked by its employees for the period

from October 24, 1938 (the effective date of the Act), to December 1, 1941, and all contracts and agreements to which petitioner was a party for the performance of "dredging and drill work, levee construction, filling work and excavating work" during that period (R. 16–17).

The application for enforcement alleged, upon information and belief, that petitioner was engaged in the performance of contracts for the dredging of coastal harbors, ship channels and ship canals, navigable rivers, streams and waterways in and about the navigable waters of the United States. It was also alleged that petitioner was engaged in the construction of levees, embankments, bulkheads and breakwaters, the filling and excavating of land, and similar work in and about navigable waters. The application recited that in these and other ways petitioner was believed to be an employer of employees engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938. (R. 5–6.)

The application alleged further that the Administrator had sought to make an investigation of petitioner's business pursuant to Section 11 (a) of the Act, but petitioner had refused to permit any such investigation on the ground that its business was not subject to the provisions of the Act, and that its employees were not engaged in activities covered by the Act, or were subject to the exemption provided in Section 13 (a) (3) for

"any employee employed as a seaman" (R. 6). Thereafter the Administrator issued an Order for Investigation in which he stated that there were "reasonable grounds to believe that the Standard Dredging Corporation * * * has violated the provisions of Sections 7 and 15 (a) (2) of the Fair Labor Standards Act * * *" and "the provisions of Sections 11 (c) and 15 (a) (5) of the Act." (R. 13, 14.) The subpoena *duces tecum* involved in this case was issued pursuant to this Order for Investigation. Petitioner refused to comply with the subpoena on the same grounds it had refused to permit the earlier attempts to investigate its business (R. 8, 18–19).

Petitioner filed an answer to the application for enforcement (R. 20–25) in which it denied that its employees were engaged in commerce or in the production of goods for commerce, and claimed that even if its employees were so engaged, they were exempt under the provisions of Section 13 (a) (3). The answer further asserted that in any event the Administrator was not entitled to inspect the wage records until it had been decided that petitioner's employees "are subject to the provisions of the Act and there has been a violation of Section 7 of the Act" (R. 24). The District Court ordered petitioner to comply with the subpoena, ruling that "the Administrator is not obliged, as a condition of obtaining an enforcement order of his subpoena, to make any

showing tnat the respondent [petitioner here] is engaged in commerce" (R. 29). The Circuit Court of Appeals, in a *per curiam* opinion (R. 37–38), affirmed "on authority of *Perkins* v. *Endicott Johnson Corp.*, 317 U. S. 501."

ARGUMENT

The decision of the court below is a correct application of this Court's decision in the *Endicott Johnson* case, and, therefore, there is no occasion for a writ of certiorari in the instant case.

1. Any conflict between the decision of the court below and that of the Sixth Circuit in the case of *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596, was resolved by this Court's decision in the *Endicott Johnson* case. This Court granted certiorari in the *Endicott Johnson* case because of a "probable conflict" with the Sixth Circuit's holding in the *General Tobacco & Grocery Co.* case (317 U. S. at 502).[1] Although the latter case was not expressly disapproved by the *Endicott Johnson* decision, the similarity of the cases warrants the conclusion that the *General Tobacco* decision must be regarded as having been superseded by the *Endicott Johnson* decision.

[1] No petition for certiorari was filed in that case because the subpoena had been signed by the Regional Director rather than the Administrator and was, therefore, unenforceable under the decision in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357.

Although the Walsh-Healey Act and the Fair Labor Standards Act occupy different areas and contain many different procedural features, both prohibit payment of substandard wages in their respective fields of coverage. To accomplish these purposes the Secretary of Labor, in the one case, and the Administrator of the Wage and Hour Division, in the other, are authorized by the respective statutes to conduct investigations to ascertain whether or not violations of the law have occurred. In both cases, the subpoena power is conferred upon the administrative official to implement his power of investigation and the Federal District Courts are given jurisdiction to order obedience to the subpoenas. The reasoning employed in the *Endicott Johnson* case to hold that enforcement of a subpoena by the District Court does not depend upon proof of coverage applies in the instant case with equal force. The Court there stated that coverage, as well as underpayments, was an "indispensable * * * element * * * of violation" and "was a matter under investigation in the administrative proceeding." (317 U. S. at 508.) Similarly, in the instant case, the Administrator is authorized to ascertain whether or not coverage exists before making the administrative determination to sue for an injunction. Since the evidence sought by the subpoena was plainly relevant to a matter entrusted to the Administrator for investigation, "it was the duty of the District Court to order its

production for the Secretary's [the Administrator's] consideration." (317 U. S. at 509.)

In the interest of efficient administration, the need for investigating the question of coverage and the impracticability of severance of the issues "for separate hearing and decision" are as evident under the Fair Labor Standards Act as under the Walsh-Healey Act. Indeed, enforcement of the subpoena without a determination of coverage should be less objectionable under the Fair Labor Standards Act. The Secretary under the Walsh-Healey Act can reach a final determination as to violations and can impose penalties without resort to the courts. On the other hand, the Administrator's investigations can result in sanctions only after the institution of actions in the court.

2. Every Circuit Court of Appeals which has considered the question, except the Sixth Circuit, has taken the same view as the court below. *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Cudahy Packing Co.* v. *Fleming,* 122 F. (2d) 1005 (C. C. A. 8), reversed, 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana* v. *Fleming,* 119 F. (2d) 209 (C. C. A. 5), reversed on the same ground, 315 U. S. 357. The case of *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. (2d) 692 (C. C. A. 10), cited by petitioner as in conflict with the de-

cision below, is not in point. The court there affirmed an order requiring compliance with the Board's subpoena, overruling the objections that the Board was guilty of capricious, arbitrary, and fraudulent conduct. The case of *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6), also cited by petitioner as in conflict with the decision below, is from the same Circuit as the *General Tobacco Company* decision, *supra*.[2]

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[2] One district court, ruling that the *Endicott Johnson* decision is inapplicable to subpoenas under the Fair Labor Standards Act, refused to enforce the Administrator's subpoena in the absence of proof by the Administrator of the applicability of the Act. *Walling* v. *News Printing Co.*, 6 Wage Hour Rept. 381 (D. N. J. 1943). Two other district courts, prior to the decision in the *Endicott Johnson* case, made the same ruling. *Walling* v. *Benson and Perkins*, E. D. Mo., Oct. 30, 1942, pending on appeal to the Eighth Circuit; *Fleming* v. *Bank of America National Trust & Savings Assn.*, 5 Wage Hour Rept. 242 (N. D. Calif. 1942).

Most of the district courts, however, have adopted the position of the Administrator. *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed 120 F. (2d) 213 (C. C. A. 1), on the ground that the subpoena was not issued by the Administrator, affirmed, 315 U. S. 784; *Fleming* v. *Minnesota Mines*, 4 Wage Hour Rept. 563 (D. Colo. 1941), reversed, 126 F. (2d) 824 (C. C. A. 10), on same grounds; *Fleming* v. *Mississippi Road Supply Co.*, 4 Wage Hour Rept. 400 (S. D. Miss. 1941), reversed, 127 F. (2d) 727 (C. C. A. 5), on same grounds; *Walling* v. *W. G. Golebiewski, Inc.*, 47 F. Supp. 448 (W. D. N. Y.); *Fleming* v. *G & N Novelty Shoppe*, 35 F. Supp. 829 (N. D. Ill.); *Walling* v. *Grieco*, 6 Wage Hour Rept. 382 (S. D. N. Y. 1943); *Walling* v. *Martin Typewriter Co.*, 48 F. Supp. 751 (D. Maine, 1942), appeal pending C. C. A. 1; cf. *Walling* v. *Mississippi Road Supply Co.*, 5 Wage Hour Rept. 935 (S. D. Miss. 1941), appeal pending C. C. A. 5.

3. Petitioner's suggestion that the decision below makes of the court's functions "a mere mechanical device" (Pet. p. 5) misconceives its effect. There are a number of defenses that may appropriately be made to an application for enforcement of the subpoena. The application may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome (*Hale* v. *Henkel*, 201 U. S. 43); or that the hearing is not of the kind authorized (*Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Comm.*, 237 U. S. 434); or that the subpoena was not issued by the person solely vested with that power (*Cudahy Packing Co.* v. *Holland*, 315 U. S. 357).

CONCLUSION

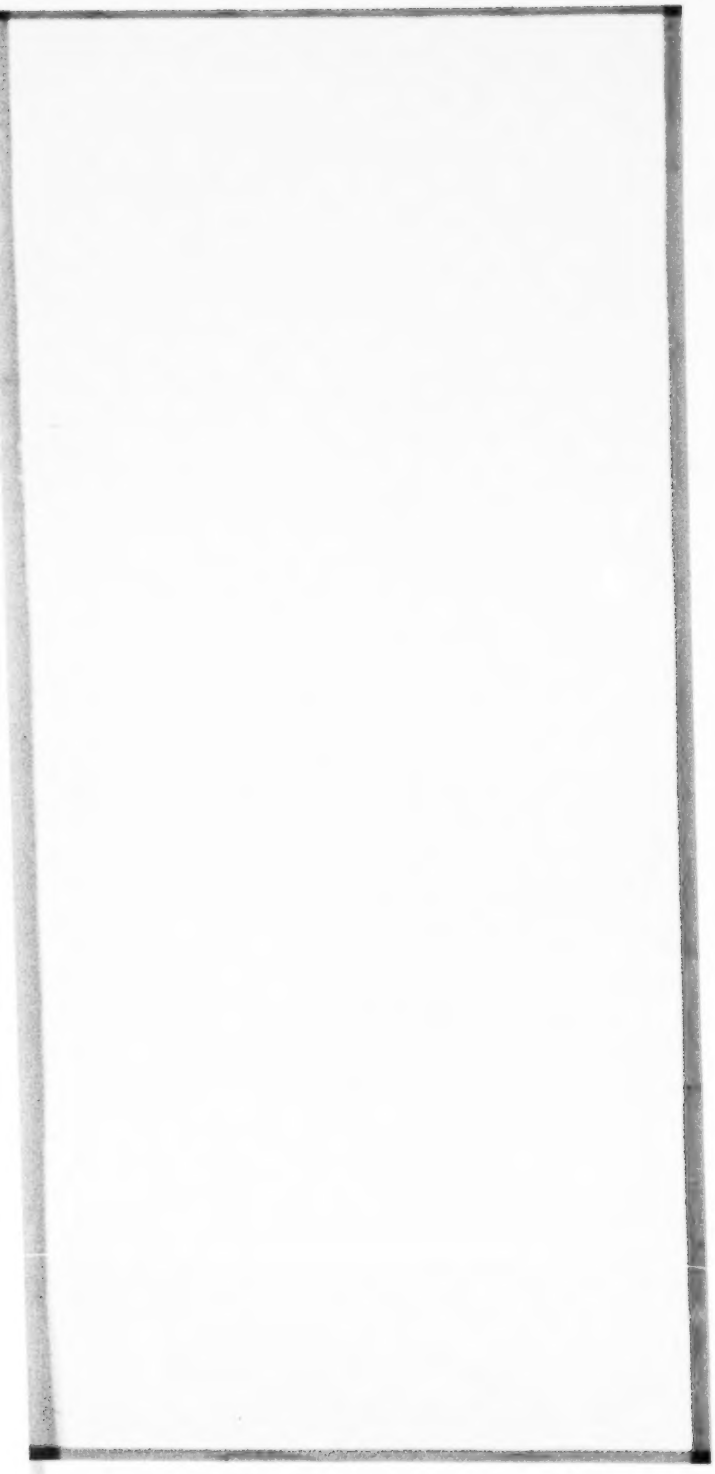
For the reasons stated it is respectfully submitted that the petition for certiorari should be denied.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor.

BESSIE MARGOLIN,
Assistant Solicitor, United States Department of Labor.

MAY 1943.



APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11(a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except

as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717, (15 U. S. C., sec. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1943